No. 89-893

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

MARYLAND PEST CONTROL ASSOCIATION, ET AL.,

*Petitioners,*

v.

MONTGOMERY COUNTY, MARYLAND, ET AL.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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December 6, 1989

## QUESTIONS PRESENTED

1. May Petitioners (plaintiffs below), associations comprised of pesticide applicators who asserted an action under 42 U.S.C. Section 1983 based upon Respondents' violation of an express provision of a federal statute, and who prevailed by judgment in the United States District Court for the District of Maryland upon their claim that Respondents' pesticide ordinances were prohibited by and in conflict with Section 136v(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. Section 136 et seq., properly be denied attorney's fees under 42 U.S.C. Section 1988?

2. Where Petitioners asserted their right under FIFRA's Section 136v(a) to be free from Respondents' local regulation subjecting Plaintiffs' members to civil and

criminal sanctions and were successful in striking Respondents' local laws under FIFRA's express prohibition of local legislation, did the United States Court of Appeals for the Fourth Circuit err in holding that Petitioners' federal statutory claim was not actionable under Section 1983 because FIFRA did not "secure" the Petitioners' right not to be subject to local regulation?

3. Does the judgment of the United States Court of Appeals for the Fourth Circuit denying Petitioners' attorney's fees, notwithstanding the fact that Petitioners prevailed by judgment on their claim that Respondents' ordinances were prohibited by and in conflict with an express provision of a federal statute (FIFRA's Section 136v(a)), conflict with the broad construction of Section 1983 set forth in Maine v.

Thiboutot, 448 U.S. 1 (1980) and Felder v. Casey, 487 U.S. ____, 108 S.Ct. 2302, (1988).

**PARTIES**

The Petitioners are the Maryland Pest Control Association (MPCA) and the Maryland Association for the Responsible Regulation of Pesticides (MARRP). These organizations are comprised of nearly three hundred businesses engaged in pest control. Petitioners' members are certified pesticide applicators subject to the Federal Insecticide Fungicide and Rodenticide Act, (FIFRA), 7 U.S.C. Section 136, et seq, extensive federal regulation thereunder and state pesticide laws. Petitioners have no parents, subsidiaries, or affiliates required to be listed pursuant to Rule 28.1.

The Defendants below, Prince George's and Montgomery Counties, Maryland, are local subdivisions of the State of Maryland.

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**IN THE SUPREME COURT FOR THE UNITED STATES**

**TERM , 1989**

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**NO. ____**

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MARYLAND PEST CONTROL ASSOCIATION, et al

Petitioners

v.

MONTGOMERY COUNTY, MARYLAND AND PRINCE GEORGE'S COUNTY, MARYLAND

Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, Maryland Pest Control Association (MPCA) and the Maryland Association for the Responsible Regulation of Pesticides (MARRP), respectfully request that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Fourth Circuit entered in this case on September 8, 1989.

**OPINIONS BELOW**

By its Memorandum and order dated September 29, 1986, the United States District Court for the District of Maryland granted judgment in Petitioners' favor holding that 136v(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, [7 U.S.C. Section 136v(a)] precluded local regulation by Respondents of the sale or use of pesticides. That opinion is set forth in the Appendix at page A-1. On June 16, 1987, the United States Court of Appeals affirmed that judgment. That opinion is set forth in the Appendix at page A-20.

Petitioners sought an award of attorney's fees as prevailing parties under 42 U.S.C. Section 1988. On February 3, 1988, the United States District Court

issued its Memorandum and Order denying Petitioners' attorneys fees. The opinion of the District Court is set forth in the Appendix at page A-28. The opinion of the United States Court of Appeals for the Fourth Circuit affirming that judgment, denying Petitioners' attorneys fees, is set forth in the Appendix at page A-35.

**JURISDICTIONAL GROUNDS**

The judgment of the United States Court of Appeals for the Fourth Circuit denied Petitioners their statutory right to an award of attorney's fees under 42 U.S.C. Section 1988, over Petitioners' claim that Respondents had deprived them of rights secured to them by the Constitution and laws of the United States under 42 U.S.C. Section 1983. Petitioners seek review of that judgment of the United States Court of Appeals for the Fourth Circuit entered

September 8, 1989. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

**CONSTITUTIONAL PROVISIONS AND STATUTES**

This Petition involves Article VI clause 2 of the United States Constitution; 42 U.S.C. Section 1983; 42 U.S.C. Section 1988; and Section 136v(a) of the Federal Insecticide Fungicide and Rodenticide Act, 7 U.S.C. 136v(a), which provide in pertinent part:

> Article VI, clause 2 of the United States Constitution:
>
> > This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the Unites States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> Section 1983:
>
> Every person who, under color of any statute ...of any

> State...subjects, or causes to be subjected, any ... person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> Section 1988:
>
> In any action or proceeding to enforce a provision of section[s]...1983...of this title,... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.
>
> 7 U.S.C. Section 136v(a):
>
> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

## STATEMENT OF THE CASE

Petitioners Maryland Association for the Responsible Regulation of Pesticides

(MARRP) and the Maryland Pest Control Association (MPCA) comprise nearly three hundred businesses engaged in pest control.

On May 20, 1986, Petitioners brought suit in the United States District Court for the District of Maryland seeking declaratory and injunctive relief against the Respondents, local subdivisions of the State of Maryland, asserting that Respondents' enactment of pesticide ordinances was in express conflict with Section 136v(a) of FIFRA. Jurisdiction was originally founded in the district court upon 28 U.S.C. Sections 1331, 2201, and 2202. Respondents' ordinances sought to control conduct concerning the use of federally registered pesticides, and subjected Petitioners' members to both criminal and civil sanctions for violation of the law. Petitioners' members are certified pesticide applicators

subject to the Federal Insecticide, Fungicide and Rodenticide Act, (FIFRA), 7 U.S.C. Section 136, et seq., extensive federal regulation thereunder, and state pesticide laws. Petitioners asserted that FIFRA secured the right of their members to be free from Respondents' "third tier" of local municipal pesticide regulation. The complaint charged that the Respondents' ordinances violated the Supremacy Clause of the United States Constitution, Article VI, Clause 2, and deprived Petitioners of their federal statutory rights protected by 42 U.S.C. Section 1983. Specifically, the complaint alleged that the local ordinances conflicted with Section 136v(a) of FIFRA.

By its Memorandum and Order dated September 29, 1986, the United States District Court granted final judgment in Petitioners' favor. Holding that Section

136v(a) authorized states to regulate the sale and use of pesticides but precluded municipalities from doing so, the district court concluded that the legislative history of Section 136v(a) evidenced an unmistakable intent to prohibit local regulation:

> the evidence is clear that Congress focused upon the very question here presented and concluded that only States and not their subdivisions should be authorized to regulate the sale and use of pesticides. (Appendix pg. A-6)

That judgment was affirmed by the United States Court of Appeals For the Fourth Circuit.

Subsequently, Petitioners applied for attorney's fees pursuant to 42 U.S.C. Section 1988. The district court denied that request. The court held that the Supremacy Clause does not "secure rights" under Section 1983 and rejected Petitioners' contention that its claim of <u>statutory</u>

violation of Section 136v of FIFRA was actionable under Section 1983. The district court noted:

> The question therefore becomes whether FIFRA is a "law" of the United States within the meaning of Section 1983. The Supreme Court has succinctly stated the framework for analysis of that question: "Maine v. Thiboutot, 448 U.S. 1 (1980), held that Section 1983 was available to enforce violations of federal statutes by agents of the State. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) and Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981), however, recognized two exceptions to the application of Section 1983 to remedy statutory violations: where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges or immunities within the meaning of Section 1983." (Appendix pg. A-30-31)

Although, the district court's own judgment in Petitioners' favor on the merits established that FIFRA's remedial scheme did not bar Petitioners from pursuing and prevailing upon a private cause of action

under FIFRA, the court concluded that the "comprehensive remedial scheme" established by FIFRA gave rise to "the clear inference that Congress intended to foreclose private enforcement of its provisions through Section 1983." Similarly, notwithstanding the direct prohibition against local legislation set forth in the statute itself, and the district court's judgment that Section 136v(a) set forth a right both sufficiently definite and personal to enable Petitioners to strike down Respondents' ordinances and prevent their application to Petitioners' members, the court held that Petitioners' request should be denied because Congress, in enacting Section 136v(a) focused upon the allocation of regulatory power among different governmental bodies and did not focus upon "the creation of private rights".

The United States Court of Appeals for the Fourth Circuit affirmed that judgment of the district court. Citing White Mountain Apache Tribe v. Williams, 810 F.2d 844, 848 (9th Cir.) (amended opinion) cert denied, 479 U.S. 1060 (1987), for the proposition that preemption of state law under the Supremacy Clause, at least "if based on federal occupation of the field or conflict with federal goals," will not support an action under 1983 and will, therefore, not support a claim for attorney's fees, the Court of Appeals concluded that the Supremacy Clause was "not itself a source" of substantive federal rights and therefore outside of the scope Section 1983. Addressing Petitioners' claim that Respondents' statutory violation of FIFRA fell within the plain language of Section 1983, the court failed to adopt the district

court's rationale that such an action was precluded by FIFRA's "comprehensive remedial scheme," and abandoned the trial court's assertion that Petitioners' statutory claim was not actionable under Section 1983, because Congress did not focus upon the creation of "private rights." Rather, notwithstanding the fact that Petitioners had prevailed in their assertion that Section 136v(a) vitiated Respondents' ordinances and precluded the application of these local laws to the activities of Petitioners' members, the Court of Appeals, without citation of authority, concluded that the right of Petitioners' members not to be regulated by municipalities was not secured by FIFRA. The Court based its judgment upon the rationale that FIFRA secures no such right "simply because it

declares that a State to the exclusion of subdivision may regulate."

## REASONS FOR GRANTING THE WRIT

This petition raises undecided issues compatible with those presently under consideration by this Court in Golden State Transit Corporation v. City of Los Angeles, (Docket No. 88-840) (October Term, 1989, argued October 3, 1989). In Golden Transit this Court has decided to address the issue of whether preemption based upon frustration of federal goals embodied in the National Labor Relations Act, without any action constituting a direct violation of the statute, may give rise to a cause of action for damages under Section 1983.

The present case presents the issue reserved in White Mountain, supra and not encompassed by Golden Transit - whether

preemption based upon a conflict with an "explicit provision of federal law" may be excluded from the plain language of Section 1983. Notwithstanding a judgment rendered by the district court specifically on the ground that Section 136v(a) prohibited the challenged local regulation, both the District Court and the Court of Appeals have concluded that fees may be denied. Petitioners are aware of no other case where a plaintiff has prevailed in obtaining a judgment premised upon defendants' violation of an express provision of a federal statute, and fees have been denied. The case thus presents this Court with an opportunity to construe Thiboutot, Felder, and Pennhurst, and to clarify whether Section 1983 "means what it says," Thiboutot, 448 U.S. at 4, and is to be accorded a "sweep as broad as its language,"

Felder, 108 S.Ct. at 2307, within the framework of a judgment based upon an acknowledged violation of federal statutory law.

In Thiboutot this court stated that Section 1983 provided a broad remedy for violation of federal statutes:

> the question before us whether the phrase "and laws," as used in Section 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act. 448 U.S. at 4.

Similarly, the Court made clear that Section 1988 extended fees to all violations of Section 1983 and made no exceptions for statutory 1983 actions:

> Once again, given our holding in Part II, supra, the plain language provides an answer. The statute states that fees are available in any Section 1983 action. Since we hold that this statutory action is properly brought under Section 1983, and since Section 1988 makes no exception for statutory

> Section 1983 actions, Section 1988 plainly applies to this suit. 448 U.S. at 9.

In White Mountain, supra, the Court not only held that preemption of state law under the Supremacy Clause "if based upon federal occupation of the field or conflict with federal goals - will not support an action under Section 1983," but, as acknowledged by the Court of Appeals in this case, further concluded:

> We emphasize that we are not dealing with a case where state action is in actual conflict with the explicit provisions of federal law. Therefore, we need not reach the question of whether a Supremacy Clause claim might give rise to a Section 1983 action where preemption was based on such actual conflict. Id. at 850 n. 8.

This case presents the issue not reached by the court in White Mountain. Notwithstanding the fact that both the district court and the Court of Appeals concluded that a specific provision of a

federal statute - Section 136v(a) of FIFRA - precluded Respondents from validly regulating Petitioners' activity, the Court of Appeals addressed the question left open by White Mountain as follows:

> The appellant also contends that its action is maintainable under Section 1983 as a suit to enforce statutory rights under FIFRA. Such charge, though, fails because the right claimed here is not one that FIFRA secures. Specifically, the right claimed is one not to be regulated in this matter by a municipality. FIFRA secures no such right simply because it declares that states, to the exclusion of subdivisions of the states, may regulate. (Appendix pg. A-46)

In taking this position, the Court of Appeals has construed, sub silentio, both Thiboutot and Felder to exclude a "subset" of federal statutory law. The text of the statute was sufficiently definite and concrete to "secure" Petitioners' right to vitiate Respondents' ordinances and to

prevent the application of Respondents' laws to the activities of Petitioners' members.

Section 136v(a) constituted more than a mere statement of "Congressional preference" or a "nudge" in the preferred direction. Wright v. City of Roanoke Redevelopment and Housing Authority, 478 U.S. 418, 423 (1987). Respectfully, to simply incant that Section 136v(a) does not "secure" Petitioners' right to be free from regulation by a municipality, ignores the very judgment obtained by Petitioners in this case. Petitioners ask this Court to address the issue of whether a judgment based upon a violation of an express provision of a federal statute may be excluded from the plain language of Section 1983 and to offer guidance upon the construction of Thiboutot, Felder and Pennhurst, supra.

## CONCLUSION

For the foregoing reasons, this Court should grant this petition and review the decision of the United States Court of Appeals for the Fourth Circuit on the issues raised herein.

Respectfully submitted,

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December 6, 1989

# APPENDIX

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

| | | |
|---|---|---|
| MARYLAND PEST CONTROL ASSOCIATION | * | |
| and | * | |
| MARYLAND ALLIANCE FOR THE RESPONSIBLE REGULATION OF PESTICIDES | * | |
| Plaintiffs | * | |
| MONTGOMERY COUNTY, MARYLAND | * | Civil Action No. JFM-86-1688 |
| and | * | |
| CHARLES W. GILCHRIST | * | |
| and | * | |
| PRINCE GEORGE'S COUNTY, MARYLAND | * | |
| and | * | |
| PARRIS N. GLENDENING | * | |
| Defendants | * | |

*****

**MEMORANDUM**

In this action for declaratory and injunctive relief plaintiffs, commercial

pesticide applicators, contend that ordinances enacted by Prince George's and Montgomery Counties imposing posting and notice requirements in connection with the application of pesticides are preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. Section 136 et. seq. This Court previously granted plaintiff's request for preliminary injunctive relief. The parties have now cross-moved for summary judgment. Plaintiffs' motion will be granted and defendants' motions denied.

As amended in 1972, FIFRA comprehensively regulates both the interstate and the intrastate sale and use of pesticides. The effect of the 1972 "amendments . . . [was] to change FIFRA from a labelling law into a comprehensive regulatory statute that will henceforth more

carefully control the manufacture, distribution, and use of pesticides." H.R. Rep. No. 511, 92d Cong., 1st Sess. at 1 (1971). See National Agricultural Chemicals Association v. Lomanger, 500 F. Supp. 465, 468 (E.D. Cal. 1980). Prior to the amendments States and local subdivisions had exercised their regulatory powers over pesticides. The 1972 amendments define the extent to which they may continue to do so. Thus, 7 U.S.C. Section 136v provides in pertinent part:

> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> (c)(1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of

> this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. Such registration shall be deemed registration under Section 136a of this title for all purposes of this subchapter, but shall authorize distribution and use only within such State.

The primary question presented in this case is whether the term "State" as used in Section 136v includes a State's political subdivisions. If it does, Prince George's and Montgomery Counties are authorized by Section 136v to enact the ordinances here in question. If it does not, they are prohibited from doing so.[1]

---

[1] Plaintiffs also argue that the notices required by the challenged ordinances constitute "labels" and that, even assuming that political subdivisions are encompassed within the term "State," the notices are therefore barred by Section 136v(b). This Court need not reach that question in light of its holding that local governments do not come within the term State as used in Section 136v. The Court notes, however, that it has substantial question about the meritoriousness of plaintiffs' argument on this point.

FIFRA defines "State" without expressly including political subdivisions. 7 U.S.C. Section 136(aa) provides that "the term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands and American Samoa." Nevertheless, citing People of California Ex Rel Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 204 Cal. Rptr. 897, 683 P2d 1150 (1984), defendants argue that absent clear evidence to the contrary, Congress should not be presumed to have excluded political subdivisions from the statutory definition.[2] To do so, defendants argue, would be to

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[2] Judge Kaus filed a dissenting opinion in Mendocino accurately analyzing (in this Court's view) the language and legislative history of FIFRA. The Attorney General of Maryland reached the same conclusion as Judge Kaus. 70 Opinions of the Attorney General, No. 85-025 (October 28, 1985).

assume that Congress intended to invade a State's sovereign prerogative to divide as it sees fit its regulatory powers among its various levels of government.

The fallacy in defendants' argument is that the evidence is clear that Congress focused upon the very question here presented and concluded that only States and not their subdivisions should be authorized to regulate the sale and use of pesticides. This is evident from the face of the statute itself. FIFRA contains several provisions that do refer expressly to political subdivisions as distinct from States. See 7 U.S.C. Section 136f(b) (officers and employees of EPA "or of any State or political subdivision" are entitle to inspect records); 7 U.S.C. Section 136r(b) (EPA to develop monitoring plan "in cooperation with other Federal, State or

local agencies"); 7 U.S.C. Section 136t(b) (EPA to cooperate with "any appropriate agency of any State or any political subdivision thereof"). Thus, as noted by Maryland's Attorney General, when Congress intended that local governments play a role in FIFRA's regulatory scheme, it specifically said so. 70 Opinions of the Attorney General, No. 85-025, at 7-8.

Furthermore, the legislative history could not be more clear. In February 1971 the President submitted a legislative recommendation which became the basis for the 1972 amendments. The Administration's proposal was introduced in the House as H.R. 4152 on February 10, 1971. Section 19(c)c of the proposed bill provided that "nothing in this Act shall be construed as limiting the authority of a State or a political subdivision thereof to regulate the sale or

use of a pesticide within its jurisdiction insofar as such regulation does not permit such sale or use as is prohibited under authority of this Act." The House Agricultural Committee held seventeen public hearings on H.R. 4152 and similar bills and on September 25, 1971 reported a new bill, H.B. 10729, out of Committee. That bill deleted any reference to political subdivisions in the section authorizing States to regulate the sale or use of pesticides. This was not by happenstance. The Committee report expressly stated that "the Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H.R. Rep. No. 511, supra, at 16.

The bill was then referred to the Senate Committee on Agriculture and Forestry. On June 7, 1972, that Committee issued its report, in which it specifically "considered the decision of the House Agricultural Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides... "The Senate Committee concurred with that decision and concluded that:

> Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting each such regulation would be an extreme burden on interstate commerce, it is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions

> of any and all jurisdiction and authority over pesticides and the regulation of pesticides. S. Rep. No. 92-838, 92d Cong. 2d. Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 3993, 4008.

The bill was then referred to the Senate Commerce Committee. When that Committee reported the bill, it contained a proposed amendment authorizing local governments to regulate the use of pesticides:

> The amendment gives local government the authority to regulate the sale or use of a pesticide beyond the requirements imposed by State and Federal authorities.
>
> While the Agricultural Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that Committee states explicitly that local governments cannot regulate pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators. The amendment of the Committee on Commerce is intended to continue the authority of such local governments and allow them to protect their environment to a greater degree than would EPA. S. Rep.

> No. 92-970 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4111.

Subsequently, in a summary of comments concerning the Commerce Committee's proposed amendments, the position of the Senate Committee on Agriculture and Forestry as to this particular proposed amendment was stated as follows:

> Authority of local governments to regulate the use of pesticides amendment would permit local governments in addition to the Federal and State Governments to regulate the sale or use of a pesticide. The Committee on Agriculture and Forestry felt that regulation by the Federal Government and the 50 States should be sufficient and should preempt the field. 1972 U.S. Code Cong. & Ad. News at 4026. See also 1972 U.S. Code Cong. & Ad. News at 4066.

Thereafter, the Agriculture and Forestry Committee and the Commerce Committee met and conferred for nearly two months. They drafted a compromise substitute bill which did not contain the

provision authorizing local regulation of pesticides. A majority of the Commerce and all the members of the Agriculture and Forestry Committee agreed to this compromise.

On September 26, 1972, the full Senate proceeded to consider H.R. 10729. The amendments proposed by the Senate Committee on Commerce were offered, including the insertion of the phrase "or local government" in the section of the bill authorizing State regulation. 118 Cong. Rec. 32251 (1972). Senator Talmidge, Chair of the Committee on Agriculture and Forestry, and Senator Allen, Chair of the sub-committee on Agricultural Research and General Legislation, offered as a substitute bill the compromise measure of the two committees. Id. at 32251-53 and 32260. With the unanimous consent of the Senate,

Senator Allen inserted in the Congressional Record an excerpt from Senate Report No. 92-838, which included the statement that FIFRA "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." Id. at 32256. Immediately thereafter, Senator Allen published for the record, the "explanation of compromise substitute for the test of H.R. 10729," Id. at 32257-58. That explanation made clear that the proposed amendment to grant local governments authority to regulate pesticides had not been included in the compromise bill. Id. at 32258. The Senate passed the compromise version of H.R. 10729 by a vote of 71-0. Id. at 32263.

Subsequently, pursuant to a Senate Resolution, members of the Senate and House

met in conference to resolve the differences between the Senate and House versions of the legislation. Since both House and Senate versions had been expressly understood to deprive local governmental units of any power to regulate pesticides, the question of local regulation was not mentioned in the joint explanatory statement of the Committee on Conference, Conference Report No. 92-1540, or in the Agriculture and Forestry Committee Statement on "Differences between the Senate Amendment to H.R. 10729 and the Conference Substitute Therefore." Id. at 33921-22. The Senate agreed to the Conference Report without a recorded vote on October 5, 1972. Id., 33924. The House considered and passed the Conference Report on October 12, 1972, by a vote of 198-99. Id. at 35543-46.

As previously indicated, this legislative history could not be more clear. Both the House and the Senate expressly considered the question of whether local governments should be authorized to regulate pesticides and, although there was an interim disagreement between two Senate committees on the issue, the legislation as finally enacted by the Senate and the House did not include the proposed language, clearly focused upon in both chambers, which would have authorized local pesticide regulation. Principled decision-making and respect for the integrity of the legislative process compel the conclusion that Congress knew and meant what it was doing.

Defendants make a final contention that even assuming that local governments are not authorized under FIFRA to regulate the sale and use of pesticides, the ordinances in

question here do not constitute such regulation. They argue that the ordinances are simply consumer information legislation. A rose (or as the plaintiffs see the legislation, a thorn) by any other name is still a rose, and the ordinances, however characterized by defendants, clearly constitute regulation. They require commercial applicators of federally regulated pesticides to post property to which pesticides are applied and to disseminate information to their customers regarding the application of the pesticides. If these requirements are not met, the applicators are subject to fine. Clearly the ordinances are intended to control conduct concerning the use of federally registered pesticides and constitute "regulation" which may be imposed under

FIFRA only by legislation enacted by the Maryland General Assembly.

A separate order effecting the rulings made in this memorandum is being entered herewith.

Date: [September 29, 1986]

J. Frederick Motz
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

| | | |
|---|---|---|
| MARYLAND PEST CONTROL ASSOCIATION | * | |
| and | * | |
| MARYLAND ALLIANCE FOR THE RESPONSIBLE REGULATION OF PESTICIDES | * | |
| Plaintiffs | * | |
| MONTGOMERY COUNTY, MARYLAND | * | Civil Action No. |
| and | * | JFM-86-1688 |
| CHARLES W. GILCHRIST | * | |
| and | * | |
| PRINCE GEORGE'S COUNTY, MARYLAND | * | |
| and | * | |
| PARRIS N. GLENDENING | * | |
| Defendants | * | |
| | ***** | |

**ORDER**

**For the reasons stated in the memorandum entered herein, it is this [29th] day of September 1986**

ORDERED

1. Plaintiffs' motion for summary judgment is granted;

2. Defendants' motions for summary judgment are denied; and

3. Judgment is entered in favor of plaintiffs against defendants.

_____

J. Frederick Motz
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FORTH CIRCUIT

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No. 86-3633

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MARYLAND PEST CONTROL ASSOCIATION;
MARYLAND ALLIANCE FOR THE RESPONSIBLE
REGULATION OF PESTICIDES

Plaintiff-Appellee

v.

PRINCE GEORGE'S COUNTY, MARYLAND;
PARRIS N. GLENDENING

Defendant-Appellant

NATIONAL PEST CONTROL ASSOCIATION

AMICUS CURIAE

AND

MONTGOMERY COUNTY, MARYLAND;
CHARLES W. GILCHRIST

DEFENDANT

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No. 86-3639

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MARYLAND PEST CONTROL ASSOCIATION;
MARYLAND ALLIANCE FOR THE RESPONSIBLE
REGULATION OF PESTICIDES

Plaintiff-Appellee

v.

MONTGOMERY COUNTY, MARYLAND;
CHARLES W. GILCHRIST

Defendant-Appellant

NATIONAL PEST CONTROL ASSOCIATION

Amicus Curiae

and

PRINCE GEORGE'S COUNTY, MARYLAND;
PARRIS N. GLENDENING

Defendant

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Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, United States District Judge. (CA-86-1688-JFM).

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Argued: April 7, 1987
Decided: June 16, 1987

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Before RUSSELL, PHILLIPS, and SPROUSE, Circuit Judges.

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Steven M. Gilbert (Larnzell Martin, Jr.; Michael O. Connaughton; John P. McKenna, Jr. on brief); Alan Marvin Wright (Paul A.

McGuckian on brief) for Appellants; Steven Paul Resnick (Bruce C. Bereano; Bereano & Resnick, P.A. on brief) for Appellees; (Lawrence S. Ebner; McKenna, Conner & Cuneo on brief) for Amicus Curiae National Pest Control Association.

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PER CURIAM:

This is a consolidated appeal by Prince George's County, Maryland, and Montgomery County, Maryland, as well as their county executives, Charles W. Gilchrist and Parris N. Glendening, from the district court's summary judgment in favor of the Maryland Pest Control Association and Maryland Alliance for the Responsible Regulation of Pesticides (the Associations). The court held that the counties' ordinances, which require public notice and consumer disclosure when pesticides are used, are invalid under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. Section 136 et seq. We affirm.

The Prince George's County ordinance was passed December 10, 1985, and became effective February 1, 1986. It requires "custom applicators" to post notices on property before and after applying pesticides and to provide customers with written statements listing the contents of pesticides and other information. The Montgomery County ordinance was passed February 16, 1986, and became effective that day. It requires "custom applicators" to post signs after applying pesticide and to provide customers information about the pesticide used. In addition, retailers of pesticides must make available "notice signs" and information sheets on the contents of pesticides they sell.

The Associations filed this action on May 30, 1986, seeking declaratory and injunctive relief. They contended that

FIFRA preempts local regulation of the use of federally registered pesticides. The district court entered a temporary restraining order against the enforcement of the Prince George's ordinance on May 30, 1986 (the day the action was filed). It entered a preliminary injunction against its enforcement on July 17, 1986. Both sides moved for summary judgment, which the court granted in favor of the Associations with respect to both ordinances on September 30, 1986. The counties' appeals were consolidated for argument.

The relevant section of FIFRA is 7 U.S.C. Section 136v entitled "Authority of States," which provides:

> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

> (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> (c)(1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. Such registration shall be deemed registration under Section 136a of this title for all purposes of this subchapter, but shall authorize distribution and use only within such State.

This section was added by the comprehensive 1972 amendment to FIFRA, included in the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, Section 2, 86 Stat. 997. Prior to the amendment, state and local subdivisions had exercised regulatory powers over pesticides. Section 136v defines the extent to which they may

continue to exercise regulatory authority. It expressly grants a state limited authority to regulate pesticide use. The counties argue that Congress intended them to have the same authority as the state, provided the state properly delegated that authority to them. The Associations, of course, argue otherwise.

The district court agreed with the Associations' position and held that the legislative history indicated Congress intended to restrict the authority to regulate to states and not extend it to their political subdivisions. It concluded:

> [T]his legislative history could not be more clear. Both the House and the Senate expressly considered the question of whether local governments should be authorized to regulate pesticides and, although there was an interim disagreement between two Senate committees on the issue, the legislation as finally enacted by the Senate and the House did not include the proposed language, clearly focused upon in both

> chambers, which would have authorized local pesticide regulation. Principled decision-making and respect for the integrity of the legislative process compel the conclusion that Congress knew and meant what it was doing.

We agree and affirm on the well-reasoned opinion of the district court. Maryland Pest Control Association v. Montgomery County, Maryland, C.A. No. JFM-86-1688 (Sept. 29, 1986).

AFFIRMED

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

| | | |
|---|---|---|
| MARYLAND PEST CONTROL ASSOCIATION, et al. | * | |
| v. | * | Civil No. JFM-86-1688 |
| MONTGOMERY COUNTY, MARYLAND, et al. | * | |

*****

**MEMORANDUM**

This Court has previously held that ordinances enacted by Prince George's and Montgomery Counties imposing posting and notice requirements in connection with the application of pesticides were preempted by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). This ruling was affirmed on appeal. Plaintiffs have now petitioned for counsel fees under 42 U.S.C. Section 1988 (1982). The petition will be denied.

Plaintiffs contend that they are entitled to counsel fees under Section 1988

because this action was properly instituted under Section 1983. The question presented is whether defendants deprived plaintiffs of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States within the meaning of Section 1983.

Plaintiffs' constitutional claims were based upon the supremacy clause. As the Supreme Court has stated, in one sense all federal rights are "secured by" the supremacy clause. See Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 613 (1979). However, just as the Court held in Chapman that the supremacy clause does not "secure rights" as that term is used in 28 U.S.C. Section 1343(a)(3) (1982), see id. at 614, so too does it not "secure rights" under Section 1983. The purpose and effect of the supremacy clause is to allocate

authority between the national and state governments, not to create rights protecting persons against governmental intrusion. See White Mountain Apache Tribe v. Williams, 810 F.2d 844,848 (9th Cir.), cert. denied, 107 S.Ct. 940 (1987); J & J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1476-77 (10th Cir. 1985).[1]

The question therefore becomes whether FIFRA is a "law" of the United States within the meaning of Section 1983. The Supreme Court has succinctly stated the framework

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[1] Plaintiffs contend that Chapman is distinguishable here because, in its later decision in Maine v. Thiboutot, 448 U.S. 1 (1980), the Court construed Section 1983 more broadly than it had construed Section 1343(a)(3) in Chapman. This contention is misplaced. It is true that, in Thiboutot, the Court held that the word "laws" in Section 1983 is broader than the phrase "Act of Congress providing for equal rights of citizens" in Section 1343(a)(3). However, nothing in Thiboutot suggests that broader constitutional rights are covered by Section 1983 than by Section 1343(a)(3).

for analysis of that question: " Maine v. Thiboutot, 448 U.S. 1 (1980), held that Section 1983 was available to enforce violations of federal statutes by agents of the State. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) and Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981), however, recognized two exceptions to the application of Section 1983 to remedy statutory violations: where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of Section 1983." Wright v. City of Roanoke Redevelopment & Housing Authority, 107 S.Ct. 766,770 (1987). Here, the comprehensive remedial scheme established by FIFRA gives rise to the clear inference that Congress

intended to foreclose private enforcement of its provisions through Section 1983. See, e.g., Almond Hill School v. United States Department of Agriculture, 768 F.2d 1030, 1038 (9th Cir. 1985); Fiedler v. Clark, 714 F.2d 77, 79 (9th Cir. 1983).[2] Likewise, as is clear from the legislative history of FIFRA (analyzed in detail in this Court's prior opinion), in enacting 7 U.S.C. Section 136v (1982), Congress was focusing upon the allocation of regulatory power among different governmental bodies, not upon the creation of private rights. Thus, the Supreme Court's analysis in Chapman of the

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[2] The legislative history of FIFRA supports this inference. An amendment that would have permitted private citizen suits was explicitly rejected by both the Senate Agriculture and Forestry Committee and the House-Senate Conference Committee. See S.Rep. No. 838, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3993, 4060; H.R. Conf. Rep. No. 1540, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code. Cong. & Admin. News 4130, 4134.

supremacy clause, see supra, is directly analogous and is dispositive of plaintiffs' claim.

For these reasons plaintiffs' petition is denied. A separate order to that effect is being entered herewith.

Date: [February 3, 1988]

J. Frederick Motz
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

| | | |
|---|---|---|
| MARYLAND PEST CONTROL ASSOCIATION, et al. | * | |
| v. | * | Civil No. JFM-86-1688 |
| MONTGOMERY COUNTY, MARYLAND, et al. | * | |

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**ORDER**

For the reasons stated in the memorandum entered herein, it is this [3rd] day of February 1988

ORDERED that plaintiff's petition for attorney's fees be denied.

J. Frederick Motz
United States District Judge

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**No. 88-1005**

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MARYLAND PEST CONTROL ASSOCIATION; MARYLAND ALLIANCE FOR THE RESPONSIBLE REGULATION OF PESTICIDES,
Plaintiffs-Appellants

v.

MONTGOMERY COUNTY, MARYLAND; CHARLES W. GILCHRIST; PARRIS N. GLENDENING; PRINCE GEORGE'S COUNTY, MARYLAND,
Defendants-Appellees

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Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-86-1688)

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Argued: February 6, 1989 Decided: September 8, 1989

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Before RUSSELL, PHILLIPS, and SPROUSE, Circuit Judges.

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Steven Paul Resnick (Bruce C. Bereano, BEREANO & RESNICK, P.A. on brief) for Appellants. Alan Marvin Wright (Clyde H. Sorrell; Michael P. Whalen, Michael O.

Connaughton, Steven M. Gilbert on brief) for Appellees.

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PER CURIAM:

Maryland Pest Control Association and Maryland Association for the Responsible Regulation of Pesticides appeal a district court decision holding that they are not entitled to attorney's fees pursuant to 42 U.S.C. Section 1988 in conjunction with their suit, brought pursuant to the Supremacy Clause and 42 U.S.C. Section 1983, charging local subdivisions of the State of Maryland with violations of Section 136v(a) of the Federal Insecticide, Fungicide and Rodenticide Act. For the reasons discussed below, we affirm the judgment of the district court.

I.

In May 1986, Maryland Pest Control Association and Maryland Association for the Responsible Regulation of Pesticides (the "Associations") brought suit in the United States District Court for the District of Maryland against the defendants Montgomery County and Prince George's County (the "Counties"), which are local subdivisions of the State of Maryland. The Associations claimed that the Counties' pesticide ordinances violated the Supremacy Clause of the United States Constitution[1] and deprived the Associations of rights protected by 42 U.S.C. Section 1983[2]. Specifically, the Associations alleged that the Counties' ordinances conflicted with Section 136v(a) of the Federal Insecticide, Fungicide and Rodenticide Act, ("FIFRA") 7 U.S.C. Section 136 et seg., which proscribed local

government regulation of the sale or use of federally registered pesticides.

In September 1986, the district court granted judgment in favor of the Associations, holding that the Counties' ordinances were invalid under FIFRA[3]. This court affirmed[4].

Accordingly, the Associations filed a motion for an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988[5]. The district court ruled that the Associations were not entitled to attorney's fees pursuant to Section 1988 because the Supremacy Clause did not "secure rights" under Section 1983, and that the Associations' claim of a statutory violation of FIFRA Section 136v was not actionable under Section 1983. The Associations appealed, arguing (1) that the Supremacy

Clause and FIFRA are actionable under Section 1983; (2) that their successful action entitled them to attorneys fees under Section 1988; (3) that FIFRA confers an "enforceable right" that entitles the Associations to attorneys fees; and (4) that Congress did not intend to foreclose private enforcement of FIFRA through Section 1983. Finding the Supremacy Clause issue dispositive of this case, we leave the appellants' remaining arguments for another day.

II.

Stated simply, the question in this case is whether the Associations' successful argument, grounded in the Supremacy Clause, that FIFRA pre-empted local laws will support a civil rights action under Section 1983 which would entitle them to attorney's fees under Section 1988. Because we hold

that the Supremacy Clause does not of itself create "rights, privileges, or immunities" within the meaning of Section 1983, we affirm the district court's denial of the Associations' motion for attorney's fees.

III.

In their complaint, the Associations claimed that the counties' ordinances violated the Supremacy Clause and deprived the Associations' members of federal statutory rights protected by Section 1983. The district court held that the case presented a simple Supremacy Clause issue: local ordinances conflicted with extant federal law. Relying on Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979), where the Supreme Court held that the Supremacy Clause did not "secure rights" for the purposes of 28 U.S.C. Section 1343(a)(3), the district court held that the

Supremacy Clause did not "secure rights" within the meaning of Section 1983.

The threshold question, then, is whether the Counties deprived the Associations of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States within the meaning of Section 1983, which would entitle it to attorney's fees under Section 1988. We begin our analysis by noting that the Supremacy Clause is, in effect, a limit on a state's power to interfere with matters of national concern. The Supremacy Clause is grounded in the allocation of power between federal and state governments and is not a source of, nor does it protect, the individual rights which the Associations assert. For example, in Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979), the Supreme Court held that the

Supremacy Clause was not a substantive constitutional provision that created rights within the meaning of 28 U.S.C. Section 1343(3)[6]. 441 U.S. at 612-615. The Court explained that "even though that Clause is not a source of any federal rights, it does 'secure' federal rights by according them priority whenever they come in conflict with state law." 441 U.S. at 613 (footnote omitted). The Court, however, added in explication: "an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution' within the meaning of Section 1343(3)." Id. at 615. In sum, the Supremacy Clause establishes the supremacy of federal over state law and is not of itself a source of substantive constitutional rights.

We note that several circuits have held that the Supremacy Clause is not a source of substantive individual rights that could support an action brought pursuant to Section 1983. For example, the Ninth Circuit, relying on Chapman, noted that "the Supremacy Clause, standing alone, 'secures' federal rights only in the sense that it establishes federal-state priorities; it does not create individual rights, nor does it 'secure' such rights within the meaning of Section 1983." White Mountain Apache Tribe v. Williams, 810 F.2d 844, 848 (9th Cir.) (amended opinion), cert. denied, 107 S.Ct. 940 (1987). As the Ninth Circuit explained, "preemption of state law under the Supremacy clause--at least if based on federal occupation of the field or conflict with federal goals--will not support an action under Section 1983, and will not,

therefore, support a claim of attorney's fees under Section 1988." 810 F.2d at 850. See also Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1394 (9th Cir. 1987) (Supremacy Clause held to not support an action under Section 1983 and therefore would not support a claim for attorney's fees under Section 1988).

Similarly, in J. & J. Anderson, Inc. v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985), the Tenth Circuit observed that the Commerce Clause and the Supremacy Clause "do not secure rights cognizable under Section 1983." 767 F.2d at 1476. Consequently, Section 1983 "does not provide a remedy for claims resulting from violations of the Commerce Clause or the Supremacy Clause. It follows that an attorney's fee claim under Section 1988, based on a Section 1983 action involving an alleged violation of the

Commerce Clause and the Supremacy Clause of the Constitution of the United States, can have no merit." Id. at 1476-77. Likewise, in Gould, Inc. v. Wisconsin Department of Industry, Labor & Human Relations, 750 F.2d 608 (7th Cir. 1984), aff'd on other grounds, 475 U.S. 282 (1986), the Seventh Circuit held that a corporation that successfully alleged that the National Labor Relations Act preempted state statutes, in violation of the Supremacy Clause, did not have a claim cognizable under Section 1983, and thus could not assert a claim for attorney's fees under Section 1988. 750 F.2d at 616 & n.16[7].

We hold that federal preemption of local ordinances pursuant to the Supremacy Clause is not actionable under Section 1983. Therefore, there can be no award of attorney's fees under Section 1988.

The appellant also contends that its action is maintainable under Section 1983 as a suit to enforce statutory rights under FIFRA. Such charge, though, fails because the right claimed here is not one that FIFRA secures. Specifically, the right claimed is one not to be regulated in this matter by a municipality. FIFRA secures no such right simply because it declares that states, to the exclusion of subdivisions of the states, may regulate.

The judgment of the district court is

AFFIRMED.

1.

Article VI, cl. 2 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

> Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. Section 1983 provides in pertinent part:

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Maryland Pest Control Association v. Montgomery County, Maryland, C.A. No. JFM-86-1688 (Sept. 29, 1986).

4. No. 86-3633 (4th Cir. 1987).

5. Section 1988 allows the prevailing party a reasonable attorney's fee as part of the costs "[i]n any action or proceeding to enforce a provision of Section[] . . .1983."

6. Jurisdiction in the present case was based upon 28 U.S.C. Sections 1331, 2201, and 2202.

7. Both J. & J. Anderson and Gould relied on Continental Freightways Corp. v. Kassell, 730 F.2d 1139 (8th Cir.), cert. denied, 469 U.S. 834 (1984), where the Eighth Circuit, in a Commerce Clause case, noted that both the Commerce Clause and the Supremacy Clause

are analogous in that they limit the power of a state to interfere with areas of national concern. Neither clause, however, secures rights within the meaning of Section 1983. Id. at 1144.